COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

COMPLAINT OF CTC COMMUNICATIONS CORP. CONCERNING REFUSAL BY VERIZON MASSACHUSETTS TO PROVIDE UNBUNDLED NETWORK ELEMENTS AT TARIFFED RATES	)	DTE No. 04-87

BRIEF OF VERIZON MASSACHUSETTS IN SUPPORT OF DEFAULT RATES FOR CARRIERS THAT PURCHASE UNE-P REPLACEMENT SERVICES

Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") submits this brief pursuant to the Department's March 9, 2006, Order on Motion for Reconsideration ("the Order"). In the Order, the Department vacated in part its year-old order dismissing this case. In so doing, the Department mistakenly concluded that access to the services at issue here is not governed by the parties' interconnection agreement ("ICA"), Order at 12, and that Verizon MA offers those replacement services at common carriage and therefore must tariff them. *Id.* at 18. In light of those findings, the Department requested that Verizon MA "assist the Department in its determination of whether Verizon is precluded from charging CTC for Verizon's non-tariffed default arrangement for enterprise and four-lines-or-more UNE-P replacement services ..." by identifying "any theories of recovery that would be applicable...." *Id.*

Verizon MA is entitled to recover its charges to CTC for the enterprise UNE-P replacement services at issue here on at least two grounds.

First, as demonstrated more fully in Verizon MA's Motion for Reconsideration filed herewith and incorporated herein, Verizon is entitled to recover its charges pursuant to its ICA. In summary, Verizon MA terminated its Section 251 enterprise UNE-P service to CTC as of August 22, 2004, in accordance with federal law and its ICA and offered to make a replacement service available at stated rates (the charges at issue here) unless CTC took certain actions, *i.e.* enter into a commercial arrangement for those services or submit orders to convert the services to resale or to disconnect them. CTC accepted Verizon MA's offer first by failing to take any of the specified actions that would indicate rejection and, after Verizon implemented a seamless transition to the replacement services with no disruption to CTC's customers, by accepting and using those services. As CTC admitted in its Complaint, at ¶ 18, "CTC ***continues to purchase*** from Verizon various network element combinations serving customers with four or more lines...." (Emphasis added.) Accordingly, § 1.5 of the UNE Remand Attachment to the ICA requires CTC to pay "all applicable charges for such services."

Second, even if the Department declines to find (which it should not) that CTC contracted to pay the surcharges at issue, Verizon MA should nevertheless be allowed to collect its charges under doctrines of quasi-contract and unjust enrichment. Although the Department noted in the Order that such equitable doctrines are not characteristic of administrative processes, no rule of law precludes the Department from taking account of and acting upon the fundamental notions of fairness and justice on which those doctrines rest, especially when doing so is consistent with and supportive of sound public policy.

Those notions apply with particular force here. Verizon MA provided ample notice to CLECs, including CTC, that Verizon MA would not provide enterprise UNE-P service after August 22, 2004. Verizon also explained the alternatives available to CLECs, as noted above.

See Order at 2-3; Complaint Exhibits 1-3. Having given such notice, Verizon MA was under no obligation to provide enterprise UNE-P or a replacement combination of services to CTC or to any other CLEC and was free to simply disconnect any UNE-P arrangements at any time after August 22, 2004. Verizon correctly anticipated that some CLECs – either out of neglect or an effort to game the system – would fail to take any action to establish alternative arrangements and thereby jeopardize continued service to their customers. In order to avoid the disruption of service to CLECs' end-user customers that would result from disconnection of Verizon MA's services, Verizon MA advised the CLECs that upon their failure to take any such action, Verizon would continue to provide services to replace UNE-P but at rates intended to replicate resale rates, which are tariffed and have been approved as just and reasonable. *See* Complaint Exhibits 1-3.

In the 90 days between Verizon MA's first notice to CLECs on May 18 and August 22, 2004, CTC took none of the actions available to ensure continued service to its customers. It did not submit orders to convert its arrangements to resale. Nor did it enter into a commercial agreement for alternative arrangements. Instead, CTC chose to make the legal argument that Verizon MA could not discontinue enterprise UNE-P service without first amending its ICA, *see* Complaint ¶ 15 and Exhibit 5, a position the Department has rejected.

In the face of CTC's failure to act, Verizon MA implemented its offer and provided replacement services to CTC in the public interest of avoiding disruption of service to CTC's end-user customers, having made it clear that the replacement services would be subject to resale equivalent surcharges. *See* Complaint Exhibits 1-3. By its own admission, CTC accepted those services, Complaint ¶ 18, and used them to serve its customers at a profit to CTC. By purchasing those services in full knowledge that the surcharges would apply, CTC accepted those surcharges.

Those services had substantial value, and CTC would be unjustly enriched should the Department allow it to enjoy those services without payment. Nor should CTC be heard to claim that Verizon MA sought to unilaterally impose its resale equivalent rates on CTC. As Verizon MA clearly informed CTC on May 18, 2004, CTC could have avoided the need to purchase these services on the terms Verizon MA offered by making alternate arrangements prior to August 22, 2004. *See e.g.* Complaint Exhibit 1, at 2. CTC chose not to make such arrangements, and thereby accepted service at the surcharged rate levels.

Furthermore, a finding that Verizon MA may not recover here would *punish* Verizon MA for acting in the public interest by continuing to provide service to CTC (thereby allowing CTC to continue to provide uninterrupted service to its customers) when Verizon MA was absolutely entitled to disconnect those services. Such a finding would also *confer a windfall* on CTC for its failure to take any action to arrange for alternate services for its customers, and for accepting Verizon MA's replacement services with no intention to pay for them. Thus, the Department should allow recovery here.

This conclusion does not run afoul of the provisions of G.L. c. 159, § 19, requiring common carriers to file tariffs with the Department for services rendered or furnished within the Commonwealth. First, based on the facts and reasoning in Verizon MA's Motion for Reconsideration, filed herewith, if the Department does not find the issue moot, it should find that Verizon MA does not in fact provide its UNE-P replacement services as common carriage subject to the statute. Second, G.L. c. 159, § 19, is not absolute. Examples of telecommunications services that have long been furnished within the Commonwealth yet not subject to a state tariff include federally tariffed services, the intrastate aspects of jurisdictionally mixed services, and services provided pursuant to interconnection agreements. The statute has room for exceptions

where, as here, an overly strict reading of its terms would result in an obviously unjust result running contrary to the signals the Department should convey to all carriers in order to ensure the smooth and regular operation of business in the public interest. It would be manifestly unjust and unreasonable to allow CTC – which intentionally ignored its responsibilities to convert its former UNE-P services to alternative arrangements – to continue to receive, in essence, those very UNE-P services at TELRIC rates (or, worse, at a rate of zero) for many months after those services had been discontinued, where other CLECs that sought to act responsibly to cooperate in the transition to post-UNE services were paying higher resale rates or similar rates under negotiated agreements.

Finally, until the Order issued on March 9, 2006, Verizon MA had no notice that the Department expected it to tariff the replacement services it provided to CTC, and accompanying rates. Although CTC sought tariffing in its Complaint, the Department *dismissed* the Complaint in its order of March 3, 2004. In doing so, the Department found that "CTC's right to enterprise switching is defined within the scope of its interconnection agreement," March 3 Order at 2, and that those rights, "which may have been altered as a result of the FCC's *Triennial Review Order* and *USTA II*, must be resolved according to the terms of the interconnection agreement," not tariff provisions. *Id.*, at 2-3 (Citations omitted). Accordingly, "the issue of access to the network elements in question will be resolved in [the then-ongoing TRO Arbitration] proceeding." *Id.*

In choosing not to disconnect CTC's replacement services, Verizon MA reasonably relied on the Department's explicit ruling that CTC's rights asserted in the Complaint were governed by the ICA, and that CTC's request that the Department require Verizon MA to file a tariff for those services was dismissed. Although CTC moved for reconsideration of that decision, the Department failed to address that motion for a full year, during which time the amount at issue

continued to accrue. Had the Department entered the current Order in a timely fashion, Verizon MA could have elected to disconnect those services to CTC, thereby minimizing its exposure and removing any grounds for the requirement to file a tariff. An order precluding Verizon MA from recovering its resale equivalent rates at this late date would be particularly unjust.

CONCLUSION

For the above reasons, the Department should find that CTC must pay and Verizon MA may recover the resale equivalent rates incurred by CTC in accepting Verizon MA's replacement services.

Respectfully submitted,

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Dated: March 29, 2006